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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY Gene C. Seacold COA
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Page

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

STATE OF WASHINGTON

Respondent,

v.

Xavier Michael Magana
(your name)

Appellant

No. 42036-8-II

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Xavier M. Magana, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attachments:

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: Nov. 13, 2011

Signature: Xavier Magana

42036-8

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

ADDITIONAL GROUND 1-INEFFECTIVE ASSISTANCE OF COUNSEL Cm
DEPUTY

Appealant contends that he should have been allowed to withdraw his guilty plea under CrR 4.2(F) because his sixth amendment right to effective counsel under U.S.C.A was violated. State v. Taylor, 83 Wn.2d 597. Xavier Magana's court appointed attorney was ineffective because of his failure to file a motion for rearraignment on murder in the second degree, and persuaded Magana into signing a plea agreement for murder in the first degree.

Prior to pleading guilty Magana had a mental health evaluation performed by "Clinic and Forensic Psychology, inc. P.S." The mental health evaluation concluded that Magana had several mental conditions, including Post Traumatic stress.(PTSD) The mental health evaluation report stated: Forensic Conclusions 6) Results of this assessment indicate that Mr. Magana experiences several several mental health conditions, including Post Traumatic Stress Disorder, believed to derive from his reported history of victimization. 8) A defense of diminished capacity, however, appears appropriate. If the shooting derives from a panic reaction derivative of PTSD, then Mr. Magana would have been unable to form the mental element of premeditated intent necessary for the charge of Murder in the first degree.

Premeditation means thought over before hand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it still will be premeditated. Premeditation must involve more than a moment in point of time,

the law requires some time, however long or short, in which a design to kill is deliberately formed. (WPIC 26 01 10)

(9) Mental health mitigation is clearly present in this matter, given the degree of disturbance seen in Mr. Magana and the nature and degree of victimization he reports by Hendricks over a lengthy period.

The defendant's capacity to appreciate the wrongfulness of his or her conduct to the requirements of the law, was significantly impaired.

RCW 9A.04.030 (1)(e)

Attached to the report and included in the defendant's Sentencing Memorandum, prepared by the trial attorney, is case law that shows that Mr. Magana should be rearraigned on Murder in the second degree. Due to Mr. Magana's mental state at the time of the crime, he could not possibly form the necessary premeditated intent required by RCW 9A.02.030 (1)(a), to commit first degree murder. see State v. Bottrell, 103 Wash.App 706, 14 p.3d

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The new trial would be as to second degree Murder, not first degree premeditated murder, See Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L Ed.2d 199 (1957) State v. Anderson, 96 Wn.2d 739, 742, 683 P.2d 742, 638 P.2d 1205 (1982)

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed to the defendant by the sixth amend. Secondly, the defendant must show that the deficient performance

prejudiced the defense. This requires showing counsel's error was so serious as to deprive the defendant a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052, 2064 (1984)

Expert Evaluation Performed by: Mark B. Whitehill, Ph.D Licensed Psychologist, Richard Maclead, MSW Licensed Independent Clinical Social Worker.

Clinical and Forensic Psychology, Inc., P.S. services at the interface of Psychology and Law. 3819-100th st. S.W., Suite 6B, LakeWood, Wa. 98499-4477, (253) 984-7686/ FAX: (253) 984-7862 www.Cfpsych.com

Attachment 9 in Def. sentencing Memorandum, over six hours of direct contact, over four months period.

~~(1) Either Mr. Magana's court-appointed attorney, John Mc Neish, read the report which includes attached case law similar to Magana's and ignored it. (Proven by not filing proper motion's in order for Mr. Magana to be rearraigned on Murder in the second degree, and persuading Mr. Magana to sign the plea agreement for Murder in the first degree.)~~

(2) Mr. Mc Neish neglected to read this report which includes attached case law similar to the defendant's case, proving he did not have the Mr. Magana's best interest at hand. Therefore, Mr. Mc Neish did not use his better judgement in assisting defendant, proving the claim of ineffective assistance of counsel. The claim of ineffective assistance of counsel has

been brought to the court's attention on two different occasions on April 19, 2010, and March 25, 2011 (Exhibit 1) State v. Jeffries, 105 Wn.2d 398 717 P.2d 722 (1986)

In the Alford plea agreement as to the charge of Murder in the first degree, dated 2-9-11; Mr. Magana with the assistance of his court appointed attorney wrote the following statement: I do not believe I am guilty of this offense. However, I understand that if I went to trial, there is a substantial likelihood I could be found guilty of the current offense or other offenses. Therefore I agree to plead guilty to take advantage of the plea agreement offered by the prosecution.

In the statement pertaining to the plea agreement, Mr. Magana believed that he could be found guilty of murder in the first degree. He also believed this because he was told so by his court appointed, and denied access to his "Mental Health Report". The conclusion of that report being that he could not possibly premeditate the intent necessary, which is an element of First degree murder, required by RCW 9A.32.030 (1)(a).

Mr. Magana was unaware of the conclusion of his Mental Health Evaluation Report, Because his court appointed attorney failed to notify Mr. Magana of the conclusion of the report, present, or explain it to him. State v. Bottrell, 103 Wn.App 706, At a minimum, "the defendant would need to be aware of the acts, and the requisite state of mind in which they must be performed to constitute a crime". (quoting State v. Hoslworth, 93 Wn.2d 148 (1980)) This shows Mr. Magana's counsel was deficient.

The test used to determine whether a criminal defendant was denied ineffective assistance of counsel is whether, after considering the entire record, it could be said that the accused was afforded an effective representation and a fair trial. State v. Adams, 91 Wn.2d 86, 89 (1978)

In the brief filed by Mr. Magana's appellate Attorney, it is argued that he was denied due process by denying his "motion to withdraw guilty plea" without first having a formal competency hearing.

Mr. Magana wants to add: He was denied due process because his court appointed attorney lead him to believe that he was able to be convicted of First degree murder, when he should have appraised him of the acts and requisite state of mind necessary. Mr. Magana's court-appointed attorney prejudiced his decision to plea to first degree murder by not informing him of the conclusion of the "Mental Health Evaluation report", pertaining to Mr. Magana's incapability to formulate the premeditation intent, required in order to be convicted of First degree Murder. Therefore Mr. Magana should of not have been advised by his court appointed attorney to plea guilty to first degree murder, and instead should of been rearraigned on Second degree Murder. See State v. Bottrell.

CrR 4.2(d) Due process requires that a defendant be appraised of the nature of the offense in order for a guilty plea to be accepted as knowingly, intelligent, and voluntarily.

Former RPC 1.4(b) Requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make an informed decision

regarding representation.

The foregoing has shown that Mr. Magana's court appointed attorney proformance was deficient, and he was prejudiced by his attorney's proformance because he was advised to plea guilty to a crime he did not have the mental capacity to premeditate, and or knowingly commit. Both the deficient and the prejudice prong of the "Strickland test" has been met.

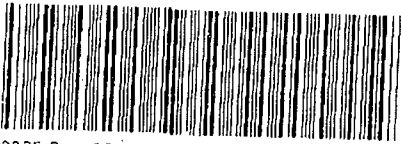
CONCLUSION.

Mr. Magana respectfully ask this court to allow him to withdraw his guilty plea, because he was represented by ineffective counsel.

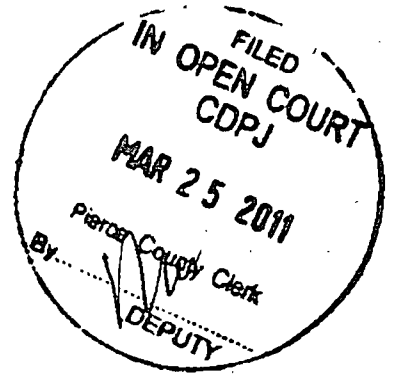
DATED this 10 th day of November 2011.


Signature

EXIBIT 1



09-1-03325-2 36113866 LTRDF 03-25-11



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff

VS

MAGANA, XAVIER MICHAEL,

Defendant

Cause No 09-1-03325-2

LETTER FROM DEFENDANT

Your Honor,

I would like to ask that the court allow me to retract my guilty plea, due to the following circumstances. During my incarceration, I have had many downfalls in my life, especially the last three months. Due to my mind frame I don't believe I was competent at the time, to fully understand and follow thru with a trial, let alone a plea bargain. If a person isn't competent to stand trial, they are not suppose to go to trial, until found competent. I believe the same should go for the plea bargain process. I'd like to explain why I don't feel I was competent, then and also now. My dad passed away in January and I haven't been able to control my emotions, let alone think clearly. My sister and mom are talking about leaving state while my wife has told me she has thought of taking my children and leaving also. With all of my loved ones leaving me, I haven't felt as if my life mattered much and it's contributed to my not thinking clearly. I feel as if my lawyer does not have my best interest at hand, as I stated in open court April of 2016, and feel he has persuaded me into signing this deal. I was taken advantage of, and among other things I was told this plea bargain is my only opportunity to ever see freedom again. When I didn't sign it, immediately, he got mad at me. I'd like to remind, Your Honor, that when I was competent in November of 2009, and offered a plea bargain similar to the one at hand, I did not sign it. Your Honor, I do not believe if I was competent or clear minded, that I would sign this plea bargain and basically sign my life away. I am also believed to be Bi-Polar and have

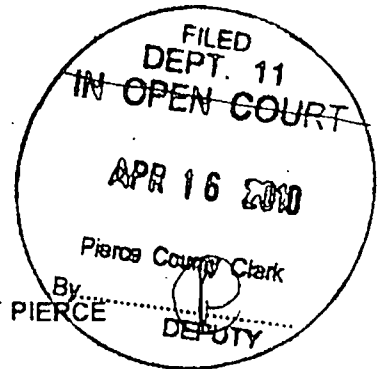
depression, which I have not been properly tested for, and so I do not have the proper medications, to allow me to think clearly and act as a normal person should. I'd like to ask, Your Honor, to please take this into consideration and allow me to retract my guilty plea and undergo a competency hearing. Thank You.

* If denied, tell judge:

Your Honor, I would like to ask to be given time to file ineffective assistance of counsel.



09-1-03325-2 34147885 LTRDF 04-19-10



IN THE SUPERIOR COURT OF WASHINGTON, COUNTY OF PIERCE

STATE OF WASHINGTON;

Plaintiff

vs.

MAGANA, XAVIER MICHAEL,

Defendant

Cause No. 09-1-03325-2

LETTER FROM DEFENDANT

Copy sent to defense Counsel on 4-16-10. (K)

Dear Judge McCarthy,

4/1/10

I am writing you because I am concerned about my assigned Counsel, John McLeish. I do believe he is not looking at my best interest, and lacks the trial experience that is needed for a serious case such as I am being accused of. As of now I am formally requesting a pro-bono attorney to represent me. I feel my current attorney is not working for in best interest and I am looking at the rest of my life right now. I have been incarcerated going on nine months and my current attorney has showed me multiple times, including not staying in contact with me, that he is not interested in my personal interests. As I stated before, that I am looking at the rest of my life due to this Murder charge, and my wish for the best possible defense attorney to defend me.

Sincerely,
Xavier Magaña

09-1-03325-2

EXIBIT 2